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Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

No. _____

***In re* WAGNER D. JACKSON, JR.**

ON PETITION FOR A WRIT OF PROHIBITION OR MANDAMUS
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF PROHIBITION OR MANDAMUS

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36pp

QUESTION PRESENTED[1]

Did the district court commit judicial misconduct by making personal threats against petitioner ?

Did the district court commit judicial misconduct by carrying out said personal threats against petitioner ?

Did the circuit court commit judicial misconduct by refusing to perform appellate review ?

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[1]Petitioner has simultaneously filed two separate petitions arising from the same case. The questions presented in the companion petition for a writ of certiorari are whether the panel decision is contrary to (1) binding precedent on racial discrimination, (2) binding precedent on summary judgment, and (3) binding precedent on federal jurisdiction.

PARTIES TO THE PROCEEDING

Petitioner is Wagner D. Jackson, Jr., *pro se*.

Respondents are The Right Stuff, Inc., Dawne Touchings, and Paula Krongard.

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PETITION FOR A WRIT OF PROHIBITION OR MANDAMUS

Wagner D. Jackson, Jr., petitioner *pro se* respectfully petitions for a writ of prohibition or mandamus to review the judgment of the Judicial Council of the United States Court of Appeals for the Third Circuit ("Judicial Council") in this case.

OPINIONS BELOW

The opinions of the Judicial Council, the court of appeals and the district court are attached. Appendix ("App."), *infra*, 1-22, 68-69.

JURISDICTION

The judgment of the Judicial Council was entered on 11 December 1998. The judgment of the court of appeals was entered on 28 January 1999. A petition for rehearing was denied on 17 March 1999. The jurisdiction of this Court is invoked under 28 U.S.C. §1651(a).

CONSTITUTIONAL AND STATUTORY LAW

The Fifth Amendment to the United States Constitution provides: "No person shall be ... deprived of life, liberty, or property, without due process of law ..."

28 U.S.C. §1651 provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. §144 provides: "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

28 U.S.C. §372 provides: "Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts ... may file with the clerk of the court of appeals for the circuit a written complaint ... After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may ... dismiss the complaint, if he finds it to be ... directly related to the merits of a decision or procedural ruling, or ... frivolous ... If the chief judge does not enter [one of the above orders], such judge shall promptly ... appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint ... Upon receipt of a report filed under ... this subsection, the judicial council ... may conduct any additional investigation

... [or] ... take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit ... or ... dismiss the complaint.."

STATEMENT

In February 1997, petitioner filed a racial discrimination in public accommodations case in the U.S. District Court for the District of New Jersey under 42 U.S.C. §1981, 42 U.S.C. §2000a, and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.*

In April 1997, the district court's first displayed its bias against petitioner when it nullified petitioner's subpoena for the April 21st deposition of a non-party witness in Washington, D.C. Literally, the district court stayed all discovery until 10:00 a.m. on April 28th, at which time petitioner would be given a fair opportunity to argue that a deposition scheduled by subpoena for April 21st should not be postponed. App., *infra*, 64. The April 14th order was signed just three days after The Right Stuff filed to block the deposition. Initially, the law clerk claimed that petitioner was not given a chance to respond because hearing argument from a *pro se* plaintiff would be impermissible *ex parte* communication. Later, the court itself said there was no need to hear petitioner because The Right Stuff designated its filing as an application for an order to show cause. App., *infra*, 114. Both excuses are nonsense. The district court ignored petitioner's due process rights because of its animosity toward racial discrimination plaintiffs.

Upon receiving the order, petitioner scheduled an April 18th teleconference with the court and submitted a legal memorandum explaining that the subpoena was enforceable by the U.S. District Court for the District of Columbia, that Chief Judge Norma Johnson was handling

the matter, and that a district court in New Jersey lacked jurisdiction over a non-party deposition in Washington, D.C. During the teleconference the magistrate screamed that he did not care what "that judge in Washington says," and threatened petitioner with sanctions if the deposition went forward. App., *infra*, 114. The deposition was rescheduled.

In early June, the district court again displayed its bias against petitioner. During the rescheduled deposition, petitioner asked the court to order the witness to answer a question and the court refused, because the deposition was occurring under the authority of the U.S. District Court for the District of Columbia. App., *infra*, 116.

In mid June, the district court prohibited petitioner from conducting further discovery of "current or former members of The Right Stuff." App., *infra*, 65-66.[1/] Of course, this order also violates the geographic limits on the court's jurisdiction as most The Right Stuff members live outside of New Jersey. Moreover, this prevented petitioner from developing information on the most important factual issue in the case, *i.e.*, the question of whether The Right Stuff agreed to do business with a known rapist after refusing to do business with petitioner. The district court claimed during a June 19th teleconference that it entered this order to protect the privacy of The Right Stuff's clients, but the May 1st Rule 16 general discovery order explicitly allowed petitioner to take such depositions, app., *infra*, 62-63, and the court knew that the Washington, D.C. deponent discussed above was a former member of The Right Stuff, so it appears that the district court stopped petitioner's

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[1/]The written order is dated 7 July 1997, but it was given orally during a teleconference on June 19th.

discovery simply to disadvantage petitioner. Petitioner raised this issue again in a 13 January 1998 motion that was simply ignored by the district court in violation of the Fed.R.Civ.P., the court's local rules and the due process clause of the Fifth Amendment.

In early July, the district court changed its established procedure for handling motions in response to petitioner's motion for sanctions against opposing counsel. It angrily mailed back petitioner's motion papers and put off even addressing the matter from early July until September 8th. App., *infra*, 60.

In September, the district court denied the motion, thereby permitting three separate acts of attorney misconduct.

First, even though the Rule 16 order explicitly limited The Right Stuff to discovery from only the petitioner, app., *infra*, 62-63, respondents directly contacted petitioner's supervisor at work, after discovering that he is a Caucasian, allegedly to take his deposition to get access to petitioner's work records. Yet respondents had been repeatedly informed that the appropriate source for such records was the personnel office of petitioner's employer, the U.S. Department of Justice, not petitioner's supervisor. Moreover, said records are irrelevant to this lawsuit, the deposition was never scheduled, and respondents probably never intended to take it. The only purpose of the contact was to harass petitioner by alerting his supervisor that petitioner had filed a racial discrimination case. App., *infra*, 110.

The Right Stuff's reply to this part of petitioner's motion for sanctions was: "Indeed, it seems axiomatic that as discovery progresses, additional discovery ... becomes

necessary .... [so the Rule 16] discovery order cannot be considered a provision [sic] of subsequent discovery." App., *infra*, 98, 108. Opposing counsel actually said that after seven weeks the Rule 16 discovery order had become (too stale ?) to restrict their conduct. Nonetheless, the district court found no violation of its order, (reasoning ?) that its orders do not mean what they say, instead they mean what the court meant for them to say, and it did not mean to prohibit defense counsel's actions. App., *infra*, 105-06.

Second, when respondents were ordered to produce certain business records before petitioner's deposition of the owner/operator of The Right Stuff, they made only an incomplete production and admitted that they had not even started to collect the material until the day before it was due. Moreover, defense counsel was asked to prepare a written draft of the court's June 19th oral discovery order and completely omitted the June 24th production deadline that they failed to meet four days later. App., *infra*, 98-99.

The Right Stuff's reply on failure to produce the documents was: "Indeed, such Order did not apply to defendants or discovery regarding plaintiff in this litigation." App., *infra*, 108-09. This response is totally incomprehensible. The order also limits petitioner's discovery, but it was issued upon petitioner's motion to compel and the part requiring respondents to produce The Right Stuff "bios" in question clearly applies to respondents. App., *infra*, 65-66. Defense counsel's response on having intentionally omitted the production deadline was: "I don't do that." App., *infra*, 100. Again, the district court again found no violation of its order and this time offered no reasoning at all. App., *infra*, 106.

Finally, even though the district court ordered a stay of all discovery on 14 July 1997, app., *infra*, 59, The Right

Stuff continued to take discovery. App., *infra*, 99, 108. Their reply was that they did not think they had to stop discovery efforts already initiated. App., *infra*, 100-01, 108. This time the district court did, reluctantly, find violation of its order. App., *infra*, 106-07. Apparently, The Right Stuff somehow violated the stay order not just as written but also as secretly imagined by the district court. *See supra* at 5-6. Nonetheless, the court said this violation was insignificant. App., *infra*, 106-07.

This incomplete listing of acts before mid-September 1997 which suggest judicial bias already begins to paint a picture of contempt for petitioner's substantive and procedural rights that most Americans would associate only with the judicial systems of unstable and undemocratic countries. But things got worse.[2]

In November 1997, the district court graduated from bias to outright judicial misconduct in violation of 28 U.S.C. §372 by making personal threats against petitioner. Initially, however, petitioner sought only to have the case assigned to a different judge pursuant to 28 U.S.C. §144. Petitioner's §144 affidavit describes the judicial misconduct as follows:

> I, Wagner D. Jackson, Jr., declare under penalty of perjury that the foregoing is true and correct:
>
> 1. I am plaintiff pro se in this action.
> 2. Magistrate Judge Stanley Chesler of the

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[2]Due to space limitations, not all of the evidence of judicial bias can be addressed herein, but was more fully presented to the Third Circuit in over 100 pages of briefs and over 600 pages of appendices. All references to document page lengths are based on the original documents on 8.5 x 11 paper, not the documents as they appear or would appear in the appendix.

court in which this action was commenced and is now pending, and before whom it is now being heard, has a personal bias against me or in favor of the defendants in this action. The facts supporting this belief are as follows:

3. During the week of 10 November 1997, plaintiff and defense counsel informed Magistrate Judge Chesler's clerk ("Bill") that counsels' draft of the final pretrial order in this case would not be completed in time for the conference with Magistrate Judge Chesler scheduled for 14 November 1997. The clerk was informed by plaintiff that this delay was entirely due to defense counsel's failure to meet Mag. Judge Chesler's intermediate deadlines for defense counsel's drafts. Plaintiff expressly requested said intermediate deadlines during the teleconference with Magistrate Judge Chesler of 31 October 1997 to avoid precisely such a conflict. Defense counsel argued that both parties were at fault.

4. Magistrate Judge Chesler's response was conveyed to counsel during a teleconference with the judge's clerk on 13 November 1997. The response, as conveyed by the clerk, was that Magistrate Judge Chesler was very upset but would reschedule the 14 November signature conference to 24 November 1997. The clerk added Mag. Judge Chesler's threat to lock counsel in his chambers on 24 November until the order was finished if the order was not ready on time. [Plaintiff lives in the Washington, D.C. area but was required by Magistrate

Judge Chesler to appear in person in Newark for his signing of the final pretrial order. The magistrate previously assigned to the case said that plaintiff need not come to Newark for this.] The clerk also warned that Magistrate Judge Chesler had a special private and personal message for plaintiff that the clerk would convey to plaintiff *ex parte* later that afternoon. Absolutely no such private personal message from a judge to a litigant with a case before said judge can be justified on any grounds, and the circumstances surrounding this message suggest that it was a personal threat. Threatening both counsel with sanctions for missing a court deadline may have been appropriate --- although, again, the delay was caused entirely by defense counsel, and Mag. Judge Chesler was so informed --- but seeking *ex parte* contact with plaintiff later that afternoon to deliver a special personal threat is conclusive proof of both bias in fact and the appearance of bias.

5. Apparently, Magistrate Judge Chesler thought better of delivering said *ex parte* personal threat to plaintiff, because plaintiff has received no subsequent communication on this matter. Plaintiff called chambers twice the next day to receive this personal message and was told that the clerk had not yet arrived for work. Nonetheless, the fact that Magistrate Judge Chesler originally sought such *ex parte* contact and had his clerk so inform counsel is threat enough and reason enough to assign this matter to another judge.

> Wherefore affiant prays that the Magistrate Judge Stanley Chesler proceed no further in this case and that another judge be designated.

There is no excuse whatsoever for a judge to seek *ex parte* communication of a "personal" message to a litigant. By definition an unbiased judge has no "personal messages" for a litigant. Seeking such communication while clearly very angry and threatening to imprison counsel in chambers is about the most conclusive evidence of personal hatred (never mind personal bias) imaginable. Obviously, the district court intended to threaten petitioner in some impermissible manner, so it was not willing to specify the threat during the teleconference, *e.g.*, drop this case or I'll hit you with so many completely unjustified financial sanctions that you'll have to declare bankruptcy. Petitioner hereby invites this Court to try to imagine any other plausible explanation. There is none, and such thuggish behavior diminishes the dignity of the federal judiciary.[3]

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[3] This is especially clear because defense counsel was entirely responsible for the delay, and even admitted partial responsibility. Moreover, the district court was only making a show of warning defense counsel at all. After all this *Sturm und Drang* about timely filing, about a month later when defense counsel requested an extension for filing their summary judgment motion, the district court quietly and politely granted it over petitioner's strenuous objection. App., *infra*, 97. This court only hates missed deadlines when it can somehow blame them on a litigant it dislikes.

The desire to unfairly blame petitioner for the delay was foreshadowed just before the November 13th teleconference when the district court's insisted that petitioner request the postponement in writing, even though defense counsel had already made the request by telephone on behalf of both parties. App., *infra*, 72 (The court says petitioner "likewise requested" postponement, but petitioner did so only because of the court's demand). Having already been informed of the delay, why would the district court then insist that petitioner make

In December 1997, petitioner filed a motion in the district court under 28 U.S.C. §144 seeking reassignment of the case to another judge due to judicial bias:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. §144.

The purpose of §144 is to avoid the appearance, as well as the actual existence, of bias or prejudice on the part of the judge assigned to a particular case. Hodgson v. Liquor Salesmen's Union Local No.2, 444 F.2d 1344, 1347 (2nd Cir.1971). "[W]hile not quite conferring a right of peremptory challenge, ... the statute is heavily weighted in favor of recusal," so it requires an affidavit and a certification from moving counsel stating that it is made in good faith. United States v. Balistrieri, 779 F.2d 1191, 1199 (7th Cir.1985). Indeed, the statute is mandatory and automatic, requiring only a timely and sufficient affidavit. Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A.R. Co., 380 F.2d 570, 576 (D.C. Cir 1967) cert. denied 389 U.S. 327 (1967). A declaration under penalty of perjury may be used in lieu of an affidavit. 28 U.S.C. §1746. If the affidavit is presented on time and in proper form, the court must take as true the facts set out therein. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §3551. Indeed, the court must

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the same request and make it in writing? Obviously, it sought to convert defense counsel's request for additional time into petitioner's request.

take the facts of the affidavit as true even if it knows them to be false. Balistrieri, 779 F.2d at 1199.

On 12 January 1998, the motion return date passed with no indication from the district court that it would even acknowledge the existence of the §144 motion, and this failure to decide the matter pursuant to the district court's procedural rules is additional evidence of bias.

On 24 February 1998, petitioner filed a motion under 28 U.S.C. §372(c) with the Judicial Council of the Third Circuit Governing Complaints of Judicial Misconduct and Disability ("Judicial Council") seeking investigation of the district court's effort to illegally threaten petitioner into ending this civil rights litigation and the court's refusal to acknowledge the §144 bias motion.

On 4 March 1998, the district court finally decided the §144 motion and denied it. App., *infra*, 22, 71-85. It did not challenge the technical sufficiency of the affidavit, which is the only defense under §144. Instead, it asserted that the secret message to be conveyed to petitioner *ex parte* was simply that "adjourning [the pre-trial order signing] conference was not the Court's usual practice" and that "both sides would be expected to stay at the courthouse until a final pretrial order was completed if it had not been fully prepared in advance." App., *infra*, 74. But this is the message conveyed during the teleconference with both parties present, minus the statements about the court's anger and minus the explicit threat to lock counsel into chambers, which the court denied, *Id.* at 74, n.1, even though disputes regarding the facts of the affidavit are prohibited under §144. Why would the court wait a couple of hours and deliver to petitioner a watered-down version of the same message in a conversation that the court said must take place *ex parte*? This story is a transparent lie. Yet the

court concluded that no reasonable person would believe it to be biased against petitioner.

Furthermore, at the end of the §144 opinion, the district court responded to defense counsel's demand for attorneys fees by acknowledging that it could have already awarded them but would not do so until defense counsel moves a second time for attorneys fees and the matter is independently briefed. App., *infra*, 83-84. It is hard to imagine why the court would need additional briefing to determine whether to award attorneys fees regarding a motion that it has just read and decided. This comment was but a thinly veiled threat to petitioner that an appeal of the magistrate's §144 decision to the supervising judge may result in an award of attorneys fees against petitioner, ostensibly for the motion already decided, but in reality to punish a later appeal. Petitioner exercised his right to appeal in spite this threat, but to no avail. App., *infra*, 22.

On 13 April 1998, Chief Judge Becker of the Judicial Council decided petitioner's February 24th judicial misconduct motion under 28 U.S.C. §372 and initially found the matter to be inseparable from the legal dispute and therefore improperly raised under §372. App., *infra*, 68-70. Petitioner filed for reconsideration.

On 7 May 1998, the district court granted The Right Stuff's motion for summary judgment and again responded to defense counsel's demand for attorneys fees by acknowledging that it could have already awarded them but would not do so until defense counsel moves a second time and the matter is independently briefed. App., *infra*, 22. Again, this comment is but another threat regarding appeal. Again, petitioner exercised his right to appeal.

On 22 June 1998, the return date passed for the second motion to make petitioner pay defense counsel's $90,000 legal bill, but the district court did not decide it. Instead it transferred the case file to the Third Circuit on 25 June 1998.

On 24 June 1998, Judge Becker reversed his earlier decision on the judicial misconduct motion and transferred the matter to the Judicial Council as a whole, having decided that the claim was not directly related to the merits of a substantive decision or procedural ruling, *i.e.*, that it alleged personal misconduct and was not just a complaint about a judicial decision. App., *infra*, 67. Apparently, he also found that the claim was not frivolous. 28 U.S.C. §372(c)(3)(A) ("After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may ... dismiss the complaint, if he finds it to be ... frivolous.").

On 23 July 1998, a month past the return date, when petitioner had about a week left to prepare his Third Circuit brief, the district court granted the attorneys fees motion, app., *infra*, 86-96, and petitioner was required to pay The Right Stuff $30,000.00 for its paid legal fees and to pay defense counsel the $60,000.00 unpaid balance. App., *infra*, 55.

On 11 December 1998, the Judicial Council said that its members could not agree on whether the district court's actions were sufficiently personal and unrelated to professional duties to be misconduct under §372(c)(3)(A), so it went on to decide whether the actions were sufficiently improper in degree to justify sanctions and found that they were not. App., *infra*, 58.

On 28 January 1999, the Third Circuit summarily affirmed the district court with a five page unpublished

memorandum opinion, app., *infra*, 1-5, that fails to mention a single case, or a single statute, or any particular legal or factual dispute in the case.[4] The opinion just lists petitioner's questions presented, complains about the linguistic tone of petitioner's briefs, and then affirms the lower court's acts showing judicial bias, acts of judicial misconduct, and other violations of binding precedent. *See* Petition For Writ Of Certiorari (filed simultaneously; describing other violations of binding precedent).[5]

This is not even a pretense of appellate review. Apparently, Judge Nygaard was unable to refute the arguments in petitioner's 50 page brief and 25 page reply brief, so he violated even the minimal requirements of Fifth Amendment due process by simply refusing to perform appellate review at all, even though review is mandatory

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[4]Not surprisingly, neither does the 17 March 1999 one sentence refusal to rehear the case *en banc*. App., *infra*, 6.

[5]Petitioner's main response to the linguistic tone criticism is that there is no nice way to describe (1) a district court's personal threats to a litigant, (2) acceptance of calculated serial perjury, and (3) refusal to enforce many other substantive and procedural laws and orders in multiple expressions of the district court's bias against petitioner. Petition For Writ Of Certiorari at 26-28 (re: acceptance of perjury). Specifically, the memorandum opinion complains about petitioner's *ad hominem* criticism of the district court. But any analysis of judicial personal bias under 28 U.S.C.§144 or judicial misconduct under 28 U.S.C. §372 is by definition *ad hominem* criticism of a court. Blanket prohibition amounts to the assertion that judges are entirely above the law. Moreover, no linguistic tone complaint can possibly affect the Third Circuit's obligation to decide appeals in accordance with U.S. Supreme Court binding precedent. Finally, some of the specific linguistic tone complaints are just inaccurate.

under 28 U.S.C. §1291 upon the filing of an appeal.[9]

This total absence of appellate analysis did not, however, prevent Judge Nygaard from declaring petitioner's appeal to be frivolous, so he ordered petitioner to pay another $20,000.00 to defense counsel for their 25 page appellate brief, bringing the total punitive fee reversal to $110,000.00.

Since early February 1999, the collection of this debt has been enforced through garnishment of 25% of petitioner's take-home pay. In April, the court supervising the garnishment also allowed garnishment of the remaining 75% of petitioner's wages from petitioner's direct deposit checking account, in clear violation of federal law (15 U.S.C. §1673) limiting garnishment to 25% of take-home pay, based on the specious argument that when wages are electronically transferred to a bank account they cease to be "wages" and may garnished. Petitioner's employer will only pay salaries paid via direct deposit to reduce administrative costs, so the option of receiving a paycheck is unavailable. Consequently, opposing counsel can now garnish 100% of petitioner's wages in an effort to drive petitioner into immediate personal bankruptcy.

This is undoubtedly one of the most severe financial

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[9]Apparently aware that his five page opinion contains absolutely no legal or factual analysis, Judge Nygaard photocopied the district court opinion and attached it to the end of his opinion, with the pagination adjusted to make the whole thing initially appear to be one document. The appendix of this petition presents only the first five pages of the appellate opinion, since the rest is already attached as the district court's opinion, but petitioner has retained the document prepared by Judge Nygaard in what appears to be an effort to completely avoid labor.

sanctions ever imposed against an attorney in the entire history of the federal judiciary, as both judges were aware that petitioner is a government attorney. Obviously, judges Lifland and Nygaard reacted emotionally to this case, rather than performing dispassionate review of the facts and the law. They may have been initially inflamed because of the subject matter of the case, *i.e.*, racial discrimination indirectly involving interracial dating; but despite the district court's early expressions of bias against petitioner, the matter was headed for trial by jury as of November 1997.[7] In November 1997, however, the district court personally threatened petitioner, and petitioner filed motions on judicial bias and misconduct. This too may have inflamed judges Lifland and Nygaard.

Clearly, this $110,000.00 sanction has absolutely no basis in any analysis of the merits of petitioner's case against The Right Stuff, and these judges have indulged themselves in violations of the rule of law, and this Court will share complicity if it does not address petitioner's arguments. As things stand now, this case is an enraged statement of judicial support for Caucasian privilege without regard to the law, including the law as written by this Court. *See* Philip Anderson, *President's Message: Justice And Inequality Don't Mix*, ABA Journal (May 1999):

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[7]Indeed, the trial brief was completed and signed by the district court in November 1997. Why would the district court have ordered preparation of the joint trial brief if it believed the case to be frivolous. A truly frivolous case should not have gotten past the April 1997 F.R.C.P. 16 pretrial conference: "**Rule 16(c) Subjects for Consideration at Pretrial Conferences** ... (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses ..."

> In preparation for a national symposium, the American Bar Association commissioned a survey on public perceptions of the justice system ...The most disturbing thing about the survey was that 47 percent of the respondents believe that in most cases, the courts do not treat all ethnic and racial groups the same ... White lawyers, for the most part, had not seen evidence of racial bias in the justice system; black lawyers had ... I have been asked if these are simply perceptions, or if the perceptions are real. They must be real. Too many people have had similar experiences. We have a problem that we must acknowledge and address ... <u>This is the ultimate challenge to the integrity of the rule of law in America...</u>

Id. at 6 (emphasis added).[8]

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[8] *See also How The Public Views The State Courts: A 1999 National Survey*, National Center for State Courts (May 1999) (83% of all surveyed feel that people "like themselves" are treated fairly in state court, but 70% of African-Americans think they are treated worse than other groups, and over 40% of whites agreed that African-Americans do not receive fair treatment, and about half of all surveyed think that African-Americans and Hispanics are treated worse than any other group identified in the study; also 81% of all surveyed said that political bias influences court decisions). *See also* Joan Biskupic, *Justice O'Connor Calls for 'Concrete Action' To Fight Bias*, Washington Post, 16 May 1999 at A5 (discussing Justice O'Connor's reaction to the National Center for State Courts survey; "Clearly this is a problem that has to be addressed ... [c]oncrete action must be taken" to erase racial bias). *See also* M. Berry, *The Pig Farmer's Daughter And Other Tales Of American Justice: Episodes of Racism and Sexism in the Courts from 1865 to the Present* (1999) ("After all, [she] was but a pig farmer's daughter; [so] in resolving the conflict between competing versions of the rape, the higher court "chose to affirm white male privilege ...").

REASONS FOR GRANTING THE PETITION

Review on a writ of prohibition or mandamus should be granted in this case of judicial misconduct because "the writ will be in aid of the Court's appellate jurisdiction, ... exceptional circumstances warrant the exercise of the Court's discretionary powers, and ... adequate relief cannot be obtained in any other form or from any other court." Rules 20(1).

I. The Decision Of The Judicial Council To Ignore Obvious Judicial Misconduct Can Be Reviewed Only By This Court

The Judicial Council of the Third Circuit says that its refusal to address judicial misconduct is final and not subject to review of any kind. App., *infra*, 58. This is false, and the Council should be prohibited from making this statement. *See, e.g.*, Judicial Council of the Tenth Circuit, 398 U.S. 74, 111-16 (1970). But it is clear that adequate relief cannot be obtained in any form but mandamus, as there is no procedure for appeal from such a finding, and it is also clear that adequate relief cannot be obtained from any other court.

Additionally, the specific question raised by this petition, whether district courts can make and execute private and personal threats against litigants, presents truly exceptional circumstances that warrant the exercise of the Court's discretionary powers.

Finally, the general question raised by this petition, whether there is any effective mechanism for policing judicial misconduct when the attorney who brings a claim is likely to suffer judicial vengeance, also presents exceptional circumstances that further support the exercise of the Court's discretionary powers:

> If they have made the path to complaining about judicial misbehavior rocky, narrow, incoherent, and fraught with peril, they presumably have done so not out of absent mindedness but rather because they want to discourage complaints. The judges' efforts appear to have worked ... [F]rom October 1981 ... through June 1986, only 309 complaints were filed ... [or] 65 complaints per year. "Corrective action" was taken only in 8 cases--less than 3% ... In the dispositions which are public, some simply make the cryptic comment that "appropriate corrective action has been taken," without revealing the nature of the conduct or the remedial action ... In sum, the very procedures set up by the judiciary betray a distinctly unfavorable disposition toward complaints about misbehavior of their fellows. These procedures provide no reassurance that judges can or should self-regulate cases of judicial misconduct.

Anthony D'Amato, *Self-Regulation Of Judicial Misconduct Could Be Mis-regulation*, 89 Mich. L. Rev 609, 614-15 (1990).

Of course, as D'Amato says, the judiciary is no different from any other guild in its inability to regulate itself:

> Yet when we look at claims for self-regulation in other professions--in medicine and in the police force, for example--we find historically that progress only takes place when outside lay persons are included on or even dominate ethics and misconduct boards. Otherwise the general operating rule is "cover it up." ... The impetus to cover up is not primarily due to friendship toward the accused but rather to a

> general perception that disclosure would lead to public disrespect of the profession as a whole ... We perhaps demand too much of human nature if we expect judges to be unconcerned with the loss of public prestige that results from admitting that cases of serious judicial misconduct are not extraordinarily rare.

Id. at 609-10.

The ultimate question raised by this petition is whether this Court has the integrity to confront this issue, rather than enforcing the general rule of "cover it up."

II. This Court's Review Is Not Limited By 28 U.S.C. §372

The Judicial Council's review of judicial misconduct was limited by 28 U.S.C. §372. By statutory definition, only activity outside of judicial professional responsibilities can even be reviewed as misconduct. This means that the most damaging abuses cannot be sanctioned by appellate courts; they can only be reversed on appeal, which does not discourage reoccurrence.

The district court's demand for *ex parte* communication to issue off-the-record personal threats was clearly non-professional activity and should have drawn sanctions even under 28 U.S.C. §372. But even more disturbingly, the threats are only part of a pattern of misconduct by the district court. As review under 28 U.S.C. §1651(a) is not limited to non-professional activity only, *see, e.g.,* Judicial Council of the Tenth Circuit, 398 U.S. at 111-16, this Court is responsible for policing the entire course of this judicial misconduct, not just the threats, but also the subsequent enforcement of the threats.

III. U.S. Magistrate Judge Stanley Chesler Committed Judicial Misconduct By Making Personal Threats Against Petitioner In Violation Of 28 U.S.C. §372

The distinction between §372 and §1651 is not relevant regarding the judicial misconduct of U.S. Magistrate Judge Stanley Chesler. His behavior is clearly covered even under the extremely limited §372. Does the Judicial Council of the Third Circuit actually believe the magistrate sought *ex parte* communication with petitioner just to deliver a more moderate version of the same warning a second time in the same afternoon, or does it believe that the magistrate is lying but that personally threatening a litigant and then lying about it is insufficient wrongdoing to constitute judicial misconduct? The first conclusion is irrational and the second is reprehensible.[9]

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[9]The magnitude of Chesler's misconduct is reflected in the recent decision to sanction U.S. District Court Judge James Ware. On 11 August 1998, the Judicial Council of the Ninth Circuit announced that it had decided to publically censure this African-American judge for lying about a childhood incident in which he claimed his brother was killed by white racists. Apparently, the racially motivated murder of Virgil Ware is not seriously contested, but Judge Ware is not related to the victim and did not witness the shooting. Consequently, the Ninth Circuit made Ware the only federal judge disciplined in the last six years, reasoning that "[t]he misrepresentations reflect negatively not only on Judge Ware's integrity, but quite possibly have had a regrettable effect on public confidence in the judiciary." Paul Elias, Judge Reprimanded For Lying, Legal Times, weeks of August 24 and 31, 1998, at 14.

Undoubtedly, Judge Ware's wrongdoing is trivial compared to that of Magistrate Chesler. Ware's lie was merely an attempt to add drama to his personal history. He did not directly harm the interests of another person and did not execute his duties as a judge in an improper manner. Chesler has issued a personal threat, while acting in his role as the judge assigned to the case, to intimidate petitioner into ending a

IV. U.S. District Court Judge John Lifland Committed Judicial Misconduct By Carrying Out The Personal Threat

The more complex issue is whether U.S. District Court Judge John Lifland should also be sanctioned for misconduct given that his actions do not fit within the limited scope of §372. Judge Lifland's misconduct consists of dismissing petitioner's action on summary judgment by making up facts not asserted by either party and then concluding on this basis that petitioner's whole case was so frivolous that a $90,000.00 sanction was justified. Of course, this analysis must logically include (1) the many acts displaying the district court's bias against petitioner described *supra* at 3-18, (2) the personal threats (explicitly sanctioned by Judge Lifland; app., *infra*, 90), and (3) the district court's twisting of law and fact to follow-up on its personal threats with personal sanctions designed to cause personal bankruptcy.

A.. The District Court Committed Judicial Misconduct By Making Up "Facts"

As better stated in the petition for certiorari, the district court's 16 page opinion is virtually nothing but a review of contested material facts, and this clearly violates

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civil rights action. Moreover, this was no empty threat. It was later carried out by Chesler's supervisor, when Judge John Lifland imposed a sanction of $90,000.00 on petitioner. Furthermore, Chesler lied in "explaining" his actions in a written court opinion that Lifland adopted in his own subsequent attorneys fees opinion. App., *infra*, 90. This is organized judicial misconduct designed to severely damage the interests of another and to generally undermine civil rights law by intimidating those who would file racial discrimination actions and/or judicial misconduct actions with the threat of personal bankruptcy. If Chesler is not more severely sanctioned than was Ware, it will be difficult to avoid the conclusion that the reason is that Chesler is white and Ware is black.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Moreover, to grant summary judgment, the court had to reject not only petitioner's version of the critical facts, but even respondent Dawne Touchings' two different sworn statements on what she was thinking when she decided to refuse to do business with petitioner, thereby inventing a new version of the facts, not offered by either litigant, that cannot be reconciled with any part of the record. Petition For A Writ Of Certiorari at 20-24.

Unfortunately, there is very little case law or academic analysis on the problem of district court judges who simply make up "facts" to support their rulings:

> I have not come across any essay or book by any judge that considers seriously the problem of lack of candor in opinion-writing. I suggest that this thundering silence is not due to a general lack of awareness of the problem, but rather reflects a deeply imbedded fear that such a matter is the dirtiest of linen that should not be displayed in public. Consider a recent, gutsy speech given to the Federal Circuit Judicial Conference by one of the nation's leading scholars on judicial ethics, Professor Monroe Freedman: 'Frankly, I have had more than enough of judicial opinions ... that falsify the facts of the cases that have been argued [and] cover up these things with no-publication and no-citation rules ...' ... Every practicing attorney with whom I have discussed the matter of lack of judicial candor has told me of at least one case when it clearly happened to him or to her, and some say that the practice is unfortunately quite common ... Judges hate to be reversed; many grade their own performance by how small a percentage of their cases are reversed on appeal. By misstating the

> facts of a case -- if misstatement is necessary to "justify" a desired result -- a judge can all but ensure that her decision will not be reversed on appeal. Higher courts ... say repeatedly that they have no time to plunge into the morass of fact-determination. Hence, a judge who invents or misstates a critical fact in favor of the party to whom she decides to award the decision may well have high confidence that her decision will thus be insulated from reversal by a higher court.

Anthony D'Amato, *Self-Regulation Of Judicial Misconduct Could Be Mis-regulation*, 89 Mich. L. Rev 609, 620-23 (1990).

Again, the question presented is whether this Court will confront this issue, or enforce the general operating rule of "cover it up."

B. The District Court Committed Judicial Misconduct By Maliciously Awarding Attorneys Fees

Clearly, the district court had no legitimate basis for awarding fees against petitioner and did so to punish petitioner for filing a racial discrimination claim or for filing a judicial misconduct claim.

1. Petitioner's Case Is Not Frivolous

Even the district court admits that a fee award pursuant to 42 U.S.C. §1988 or 42 U.S.C. §2000a-3(b) is discretionary and requires analysis on whether plaintiff's claim was "frivolous," so as to avoid creating an overly deterring effect on enforcement of civil rights laws. App., *infra*, 88-89. For this reason, the district court goes on to conclude petitioner's whole case was not only invalid but frivolous, and not only frivolous but made in objective bad faith, and not only made in objective bad faith but made in

subjective bad faith, and not only made in subjective bad faith under a standard appropriate for lawyers but in subjective bad faith under a more forgiving standard appropriate for *pro se* litigants. App., *infra*, 89-95.[10] After setting this goal, the district court cites as its only evidence of petitioner's frivolousness and bad faith (1) the §144 motion for a new judge due to bias, (2) the fictional gender discrimination argument, and (3) petitioner's allegation of Dorothy Miller's incidental racial discrimination. App., *infra*, 91-93.

Petitioner's response on the §144 motion was the argument restated *supra* at 3-18. This evidence of judicial bias culminating in judicial misconduct was sufficient to convince Chief Judge Becker not to dismiss the §372 judicial misconduct charge as groundless and to send the matter to the Judicial Council. App., *infra*, 67. Even the Judicial Council then expressed some difficulty in rejecting the claim, despite its institutional shortcomings discussed *supra* at 19-20. If the assertion of misconduct was not frivolous or made in bad faith, then neither is the assertion of mere bias.

Petitioner's response on the gender discrimination claim was that there has never been any such claim. The complaint claims discrimination on the basis of "race and/or gender" because The Right Stuff may have discriminated against petitioner as a person of color or as a man of color. Petitioner made this clear to the district court in the summary judgment opposition brief, app., *infra*, 56, and in the attorneys fees opposition brief, app., *infra*, 118-

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[10]Of course, one might ask why a case this weak survived the Rule 16 hearing, progressed through the preparation of a trial brief, and then required 16 pages of fact-finding on summary judgment.

19, but the district court ignored these disavowals and still irrationally holds on like grim death to its attack on an imaginary pure gender discrimination claim.[11/]

Petitioner's response on the assertion of racial discrimination by Miller was that petitioner has presented perfectly good reasons for the assertion that Miller refused a second date based on race and then lied about it. The district court even quotes some of this evidence and still calls the allegation "a baseless conclusion." App., *infra*,

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[11/]The attorneys fees opinion says that this "is not a disavowal" but is "seemingly [an attempt] to explain what is clearly a frivolous claim" because "each allegation of the complaint states that plaintiff was discriminated against on the basis of race and/or gender." App., *infra*, 92. First, whatever the complaint says, disavowal was later made to the district court twice as stated above, and even the court acknowledges the same statement made during petitioner's June 1997 deposition. *Id.* Second, the district court's assertions about the phrase "and/or" suggest an obstinate rejection of basic English grammar. Admittedly, the phrase "A and/or B" can mean A alone, and B alone, and A and B together. But it can also mean A alone, and A and B together, but not B alone. It can also mean B alone, and A and B together, but not A alone. Petitioner has always claimed discrimination either on the basis of race alone, or on the basis of race and gender together, but not on the basis of gender alone. Third, this is irrelevant, because respondents cannot show any legal expenses associated with this imaginary stand-alone gender discrimination argument. The district court says that of the three discrimination statutes in the case only the New Jersey statute allows gender discrimination claims, and the court's review of defense counsel's billing shows that "any separate time spent defending Plaintiff's NJLAD gender discrimination claim was de minimis." App., *infra*, 95-96. The district court performed this analysis because it is more difficult to award attorneys fees against a plaintiff under the NJLAD, so the court wanted to find that little of the $90,000.00 claim could be attributed to this part of the case. Yet the district court justified its fee award four pages earlier by complaining that: "Defendants have had to defend against plaintiff's [frivolous] gender discrimination claim throughout the course of this litigation." App., *infra*, 91. If so, then why was the time spent de minimis?

91.[12] Moreover, there is no lawsuit against Miller, so this is irrelevant.

2. No Fees May Be Claimed For Work Before The End Of Discovery

Furthermore, the district court awarded defense counsel $90,000.00 in fees for the entire pendency of this matter before this district court even though defense counsel did not call the claim frivolous until 20 November 1997 and vehemently claimed during a 23 December 1997 teleconference with the district court that they could not assess the strength of the case and file for summary judgment until the end of discovery in November 1997. App., *infra*, 117. This admission appears again in their motion for fees itself. App., *infra*, 120. Even the district court acknowledged it. App., *infra*, 93. Since respondents cannot logically claim fees for activity before the end of discovery, their claim boils down to the notion that petitioner should not have put them to the trouble of writing their motion for summary judgment. This argument was presented to the district court and it could think of no

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[12]One of petitioner's exhibits in the trial brief is polling data collected by researchers at the University of Michigan. J. Patterson and P. Kim, *The Day America Told The Truth: What People Really Believe About Everything That Really Matters* (1991). This evidence shows that 77% of white Americans admit refusal to even consider a romantic relationship with a black person. *Id.* at 184 (Also, 44% admit to feeling anger upon seeing a black man and a white woman walking hand-in-hand). This statement is quoted by the district court, app., *infra*, 92, and is then ignored. Of course, Miller's racial discrimination in dating is not illegal. But plaintiff could reasonably conclude and then say to Miller that she broke the second date due to race even absent any additional information regarding Miller herself. Moreover, there is plenty of supporting evidence regarding Miller herself in the inconsistencies in her constantly changing series of excuses.

response. App., *infra*, 86-96.

3. The District Court Awarded Attorneys Fees Without Jurisdiction Over The Case

A court cannot make a discretionary award of attorney's fees without jurisdiction over the case. The 7 May 1998 summary judgment decision rejected respondents' attached motion for fees and required a post-judgment motion with a new briefing schedule. App., *infra*, 22. The motion was filed on 26 May 1998, app., *infra*, 57, but a post-judgment motion for fees must be filed within 14 days of the final decision on the merits as per Fed.R.Civ.P. 54, so petitioner's 1 June 1998 appeal, app., *infra*, 121, terminated the district court's jurisdiction:

> An appeal from a final order normally ousts the district court of jurisdiction ... While power to perform ministerial acts remains ... which would include routine assessment of costs ... we are aware of no case dealing with discretionary costs which, as this case demonstrates, might well lead to an [independent] appeal. The policy against piecemeal appeals suggests that a court proposing to award discretionary costs should do so before the appeal is taken from its substantive order ... in time for us to consider both matters together. We would hold that insofar as a court's measure of a party's obstinacy depends on the merits of the case, it must make that assessment while the merits are before it, either prior to an appeal, or on remand ...

Wright v. Jackson, 522 F.2d 955, 958 (4th Cir. 1975).

As noted above, even the district court admits that its fee award requires analysis of whether plaintiff s claim was frivolous. App., *infra*, 87. This is the sort of analysis contemplated in Wright, and the issue of timing is more

significant here because district court's decision on fees was not only made without jurisdiction, but it appears to have been timed so as to maximize interference with petitioner's effort to complete the appellate brief. *See supra* at 14.

V. U.S. Court Of Appeals Judge Richard Nygaard Committed Judicial Misconduct By Refusing To Perform Appellate Review

On 28 January 1999, the Third Circuit summarily affirmed the district court with a five page unpublished memorandum opinion, app., *infra*, 1-5, that fails to mention a single case, or a single statute, or any particular legal or factual dispute in the case, even though said review is mandatory under 28 U.S.C. §1291 upon the filing of an appeal. This too is judicial misconduct. See *supra* at 14-16.

CONCLUSION

This Court should at least publically denounce such judicial misconduct, so the petition for a writ of prohibition or mandamus should be granted.

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